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Supreme Court of the United States

October Term, 1965.

JAMES ATHORN, JR.,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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TABLE OF CONTENTS OF PETITION

	PAGE
Petition for Writ of Certiorari to the Supreme Court of New Jersey	1
Citations to Opinion Below	1
Jurisdiction	1
Question Presented	2
Constitutional Provisions	2
Statement	2
How Federal Questions Are Presented	4
Reasons for Granting Writ	4
Conclusion	6

TABLE OF CITATIONS

CASES:

State v. Leavitt, 36 N. J. 266, 176 A. 2d 465 (1961)	5
State v. LaFera, 42 N. J. 97, 199 A. 8d 630 (1964)	5
McDonald v. Pless, 238 U. S. 264, 59 L. Ed., 1300 (1915)	5, 6
Lett v. United States, 15 F. 2d 690 (8th Cir., 1926)	5
Dennis v. United States, 70 S. Ct. 519, 339 U. S. 162, 94 L. Ed. 734 (1950); rehearing denied 70 S. Ct. 799, 339 U. S. 950, 94 L. Ed. 1364 (1950)	5

TABLE OF CONTENTS

PAGE

Frazier v. United States, 69 S. Ct. 201, 335 U. S. 497, 93 L. Ed. 187, rehearing denied 69 S. Ct. 488, 336 U. S. 907, 93 L. Ed. 1072 (1948) 5, 6

Janko v. United States, 281 F. 2d 156 (8th Cir. 1960) 6

STATUTE:

28 U. S. C. 1257(3) 1

Art. I, Paragraph 10 of the New Jersey Constitution. 4, 5

TABLE OF CONTENTS OF APPENDICES

Appendix A—Constitutional Provisions involved:

Article I, Paragraph 10 New Jersey Constitution ..4, 5, 7

Sixth Amendment United States Constitution..1, 2, 4, 5, 7

Fourteenth Amendment United States Constitution.1, 2, 7

Appendix B—Opinion of Supreme Court 8

Appendix C—Judgment of Supreme Court of New Jersey Sought to be Reviewed 13

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Athorn, Jr., respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey entered in the above entitled case on January 24, 1966, which judgment reversed an Order of the Superior Court, Law Division, Criminal, entered on November 30, 1964.

CITATIONS TO OPINION BELOW.

The opinion of the Supreme Court of New Jersey, by Justice Haydn Proctor, printed in Appendix B hereof is reported in 46 N. J. 247, 216 A. 2d 369.

JURISDICTION.

The judgment of the Supreme Court of New Jersey was entered on January 24, 1966: A copy thereof if printed in Appendix C hereto, *infra*. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3) since petitioner's rights under the Sixth and Fourteenth Amendments to the Constitution of the United States are drawn in question.

QUESTION PRESENTED.

1. Whether the Supreme Court of New Jersey may effectively limit the privilege to a public trial by an impartial jury provided within the Sixth Amendment by refusing to vacate a jury verdict for other than racial or religious bias?

2. Whether the statements allegedly made during jury deliberations to the effect that "cops takes bribes" reflect prejudice against the defendant sufficient to render the verdict a nullity?

CONSTITUTIONAL PROVISIONS.

The constitutional provisions involved are New Jersey Constitution Article I, Paragraph 10 and the Sixth and Fourteenth Amendments to the United States Constitution, all of which are printed in Appendix A; *infra.*

STATEMENT.

On September 28, 1964, a jury in the Essex County Court found the petitioner, a police officer, guilty of extortion and misconduct in office. About one month later the court and petitioner's trial counsel received notice from the prosecutor that one of the jurors alleged that the verdict had been improperly rendered. The trial judge summoned the juror, Samuel Molee, and questioned him in the presence

of the petitioner's trial counsel and the prosecutor. The following statements were adduced: *

"So I say I just didn't like the way that jury was, because to me it looked a little prejudiced somehow because . . ."

* * * * * * * *

Then after most of the women on the jury, and a couple of men, this I know, they says that well, we know for a fact that cops takes bribes."

"Q. Who said that? A. Most of the women jurors.

* * * * * * * *

Q. What is it that you say she said?

A. She says they know for a fact that cops take bribes. And I got up right away.

Q. She said who knows this? A. That we all know for a fact that cops take bribes. So I got up right away and I said, 'Now, look, we are not supposed to bring that in here. We are supposed to go by the evidence on this one man. You can't condemn one man for what the other officers did.' I mean that was wrong. We were just supposed to go with the evidence that we gathered in the court."

At the conclusion of the hearing the trial judge entered an Order directing the interrogation of the remaining members of the jury. The prosecutor sought and was granted a stay of the Order and sought and was granted leave to appeal the entry of the Order. The Supreme Court of New Jersey certified the cause while the appeal was pending. On January 24, 1966 the Supreme Court of New Jersey entered judgment which reversed the Order of the trial judge.

*** Refers to the State's appendix in the Supreme Court of New Jersey, which appendix has been certified and filed with this petition as a part of the official record below.**

HOW FEDERAL QUESTIONS ARE PRESENTED.

Petitioner's trial counsel was advised of the infirmity in the jury verdict at the time when notice of the alleged misconduct of the jury was given to the trial court by the prosecutor. Petitioner's trial counsel was present at the interrogation of the juror, Samuel Molee, by the trial judge, and, upon completion of the interrogation, he moved for an Order directing interrogation of the jury. This Order was entered by the trial court and the matter proceeded for appellate review. The Supreme Court of New Jersey, upon reversal of the Order of the trial judge stated:

> "We do not believe that Molee's allegations, even if they were to be substantiated by the testimony of the other jurors, would be a sufficient basis on which the conviction could be set aside, and thus the trial court's order must be reversed."

The New Jersey Supreme Court has thusly stated that it will not find bias and prejudice against petitioner other than racial or religious prejudice as violative of petitioner's privileges under Art. I, Paragraph 10 of the New Jersey Constitution and the Sixth Amendment to the United States Constitution.

REASONS FOR GRANTING WRIT.

1. The constitutional provisions of the State of New Jersey and the United States secure the petitioner the right to trial by an impartial jury. The Supreme Court of New Jersey has effectively defined and limited impartiality as

and to freedom from racial and religious bias and prejudice. The Supreme Court of New Jersey has upset convictions tained by religious bias *State v. Leavitt,* 36 N. J. 266, 176 A. 2d 465 (1961) and nationalistic prejudice *State v. LaFera,* 42 N. J. 97, 199 A. 2d 630 (1964). It has refused in the action at bar to upset a conviction tained with prejudice against an occupational class of public servants. There is no justification either in Art. I, Par. 10 of the New Jersey Constitution or in the Sixth Amendment to the United States Constitution for such limitation. The sole justification offered by the New Jersey court is the necessity for the preservation of secrecy of jury deliberations and also the possibility of jury tampering and fraudulent practices. Thus the petitioner's privilege to an impartial trial is diluted. *McDonald v. Piess,* 238 U. S. 264, 59 L. Ed. 1300 (1915), while stating the problems inherent to interrogation of jurors after verdict did not set forth qualifications and guidelines. This dilution of petitioner's Sixth Amendment privilege is accomplished without reliance upon any precedent of this Court or other federal court. This judgment of the New Jersey Supreme Court conflicts with the opinions of this Court and other federal courts. Prejudice resulting to a defendant from a trial before jurors who were familiar with the facts of the case after having deliberated the issues in a case against the defendant's wife was sufficient to require a new trial. *Lett v. United States,* 15 F. 2d 690 (8th Cir., 1926). This Court in *Dennis v. United States,* 70 S. Ct. 519, 339 U. S. 162, 94 L. Ed. 734 (1950); rehearing denied 70 S. Ct. 799, 339 U. S. 950, 94 L. Ed. 1364 (1950), stated that while the presence of government employees as a class in a jury at a trial wherein the government was a party was not sufficient to indicate partiality or bias but any affirmative statement of such juror would be cause. See also *Frazier v. United States,* 69 S. Ct. 201, 335 U. S. 497, 93 L. Ed. 187, rehearing denied 69 S. Ct. 488, 336

U. S. 907, 93 L. Ed. 1072 (1948). In *Janko v. United States*, 281 F. 2d 156 (8th Cir. 1960), the court approved the following interrogation made to all the jurors after the verdict.

> "Were any of you persuaded or influenced by anything other than the testimony you heard in the courtroom during the trial of this case and based upon the testimony of this case alone." *Janko*, supra, at 169.

The Supreme Court of New Jersey would preclude such interrogation.

The serious issues raised in *McDonald v. Pless*, supra, should be resolved by this Court. A definitive statement on the conflict between the interest of the defendant to a fair and impartial trial and his remedy in the event of an erosion of said right by bias and prejudice in the jury room and the policy against intrusion upon jury deliberations would be of aid to the bench, the bar and the public at this time.

CONCLUSION.

For the foregoing reasons, this petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRIEDMAN & D'ALESSANDRO,
Attorneys for Petitioner
EDWARD G. D'ALESSANDRO,
A Member of the Firm.

Date:

APPENDIX A.

APPENDIX A—CONSTITUTIONAL PROVISIONS INVOLVED.

NEW JERSEY CONSTITUTION.

Article I, Paragraph 10:

In all criminal prosecutions the accused shall have the right to a speedy and public trial by an impartial jury; to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel in his defense.

UNITED STATES CONSTITUTION.

Amendment VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusations; to be confronted with the Witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B.

OPINION OF SUPREME COURT.

Argued ..... Decided .....

MR. PHILIP R. GLUCKSMAN, Assistant Prosecutor, argued the cause for the Plaintiff-Appellant (MR. BRENDAN T. BYRNE, Prosecutor of Essex County, attorney; MR. PHILIP R. GLUCKSMAN on the brief).

MR. EDWARD G. D'ALESSANDRO argued the cause for the Defendant-Respondent (MESSRS. FRIEDMAN & D'ALESSANDRO, attorneys; MR. EDWARD G. D'ALESSANDRO on the brief).

The opinion of the court was delivered by

PROCTOR, J.

This is an interlocutory appeal by the State from the trial court's order directing an interrogation of the jurors who had returned a verdict of guilty against the defendant. The Appellate Division granted the State's motion for leave to appeal, and while the appeal was pending we certified the case.

On September 28, 1964, a jury in the Essex County Court

found the defendant, a Newark police officer, guilty of extortion and misconduct in office. About a month later, the court received notice from the prosecutor that one of the jurors alleged that the verdict had been improperly rendered. As a result, the trial judge summoned the juror, Samuel Molee, and questioned him in the presence of the defendant's attorney and the prosecutor.

Molee testified that the jury balloted three times, twice eleven to one and finally unanimously, to find the defendant guilty, Molee having been the only holdout. During the course of the deliberations, some of the jurors remarked, "cops take bribes," the foreman giving newspapers as the source of this knowledge. Molee further testified that one of the women jurors called him "stubborn" and several exclaimed, " 'Oh, my God!' like they were looking to get home or something" when he persisted in his not-guilty vote. He also claimed that he was "tricked" into voting guilty by a juror who seemed to agree with him that the defendant was innocent but who then cast his vote for guilty. Further, he said he was disturbed because the trial judge frequently called the defense counsel up to the side bar but never the assistant prosecutor. Finally, Molee asserted that he misunderstood the trial court's instruction that the jury must reach a unanimous verdict; he stated that at the time of the trial he had never heard of a "hung jury" but that had he been aware of that possibility he would never have changed his vote to guilty. However, Molee admitted that when the jury was polled he again voted to find the defendant guilty.

On the basis of the above testimony the trial court concluded that it would interrogate the other jurors concerning Molee's allegations. On the State's motion the order to that effect was stayed by the Appellate Division, and the propriety of the order is the subject of this appeal.

We do not believe that Molee's allegations, even if they

were to be substantiated by the testimony of the other jurors, would be a sufficient basis on which the conviction could be set aside, and thus the trial court's order must be reversed. Calling back jurors for interrogation after they have been discharged is an extraordinary procedure which should be invoked only upon a strong showing that a litigant may have been harmed by jury misconduct.

If verdicts could be easily set aside as a result of an investigation into secret jury deliberations, disappointed litigants would be encouraged to tamper with jurors, to harass them and to employ fraudulent practices in an effort to induce them to repudiate their decisions. Moreover, an open invitation would be extended to any disgruntled juror who might choose to destroy a verdict to which he had previously assented. See, *e.g., McDonald v. Pless,* 238 U. S. 264, 59 L. Ed. 1300 (1915); *Hutchinson v. Consumers Coal Co.,* 36 N. J. L. 24, 25-26 (Sup. Ct. 1872); *State v. Gardner,* 230 Ore. 569, 371 p. 2d 558 (1962); *People v. Van Camp,* 356 Mich. 593, 97 N. W. 2d 726 (1959); *Sanitary Dist. of Chicago v. Cullerton,* 147 Ill. 385, 35 N. E. 723 (1893).

The secrecy surrounding jury deliberations is necessary not only to prevent the unsettling of verdicts after they have been recorded, but also as an aid to the deliberative process itself. Each juror should be encouraged to state his thougths freely, good or bad, so that they may be weighed by the other jurors. *State v. LaFera,* 42 N. J. 97, 106 (1964). "Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world." *Clark v. United States,* 289 U. S. 1, 13, 77 L. Ed. 993, 999 (1932). Cf. R. R. 1:25A.

Thus, our courts and those of other jurisdictions have generally refused to accept from jurors, for the purpose of impeaching a verdict, any evidence of the discussion which they may have had among themselves while considering

their verdict. See *McDonald v. Pless, supra; Bragg v. King,* 104 N. J. L. 4 (Sup. Ct. 1927); *Queen v. Jennings,* 93 N. J. L. 353 (Sup. Ct. 1919); *Peters v. Fogarty,* 55 N. J. L. 386 (Sup. Ct. 1893); *Lindauer v. Teeter,* 41 N. J. L. 255 (Sup. Ct. 1879); *Hutchinson v. Consumers Coal Co., supra; Pulitzer v. Martin S. Ribsam & Sons Co.,* 19 N. J. Misc. 233 (Sup. Ct. 1941); *Marconi v. MacElliott,* 8 N. J. Misc. 69 (Sup. Ct. 1930); *Davis v. United States,* 47 F. 2d 1071 (5th Cir. 1931); *R. v. Thompson* [1962] 1 All E. Rep. 65 (1961); 8 Wigmore, Evidence (McNaughton rev. 1961), §§2346 to 2349 (see cases collected in footnote 2 at pp. 682-690); *McCormick,* Evidence §68 (1954). However, no inflexible rule can be laid down because cases do arise where "the plainest principles of justice" demand that a new trial should be directed upon a proper showing. *Mattox v. United States,* 146 U. S. 140, 148, 36 L. Ed. 917, 920 (1892); *United States v. Reid,* 53 U. S. 361, 366, 13 L. Ed. 1023, 1025 (1851). For this reason we have recognized two exceptions to the general rule that jury verdicts shall not be disturbed because of what may have been said by jurors during their deliberations. First, where a juror informs (or misinforms) his colleagues in the jury room of facts about the case, based on his personal knowledge, which facts were not introduced into evidence at the trial, the resultant verdict may be set aside. *Brandimarte v. Green,* 37 N. J. 557 (1962); *State v. Kociolek,* 20 N. J. 92 (1955); see *Capozzi v. Butterwei,* 2 N. J. Super. 593 (Law Div. 1949). And, where a juror by his comments in the jury room manifests racial or religious bigotry against a defendant, we have upheld the trial court's action in granting a new trial. *State v. Levitt,* 36 N. J. 266 (1961). "It is a vicious thing to convict a man out of bigotry, and hence, despite the strong policy against probing the motivations which inhere in a jury's verdict, 8 Wigmore, Evidence (McNaughton rev. 1961), §2349, p. 681, we will hear a charge that a juror manifested such bias in his con-

sideration of the case." *State v. LaFera,* supra at 110. See also Comment, 25 U. of Chi. L. Rev. 360, 369 (1958).

In the present case we find no reason for departing from the general rule that evidence of expressions or arguments of jurors made during their deliberations may not be used to impeach the verdict. There is nothing in Molee's testimony to suggest that a juror had expressed personal knowledge of any facts concerning the defendant which were not adduced in evidence. See *Brandimarte v. Green,* supra and *State v. Kociolek, supra.* Although some of the jurors may have stated during the deliberations that "cops take bribes," our reading of the record leads us to conclude that the statements were not manifestations of bias against the defendant because he was a police officer but simply observations by certain jurors that in the past they have heard of instances where police officers had accepted bribes. Considering today's broad coverage of all forms of news media it would be virtually impossible to find twelve jurors for any criminal trial who have not read or heard of events similar to those in the case actually before them. Cf. *People v. McCaffrey,* 118 Cal. App. 2d 611, 258 P. 2d 557 (Dis. Ct. App. 1953).

With regard to Molee's claim that he misunderstood the trial court's instructions, it has been repeatedly held that such a claim will not be a ground upon which a juror can impeache his own verdict. See, *e.g., Bragg v. King, supra; Walker v. United States,* 298 F. 2d 217, 226 (9th Cir. 1962); *Rotunda v. Isthmian Steamship Lines,* 243 F. 2d 581, 583 (2nd Cir. 1957); *State v. Stump,* 254 Ia. 1181, 119 N. W. 2d 210, 222-223 (1963).

Molee's allegations that he was "tricked" by another juror into voting guilty, that one of the women jurors called him "stubborn," that other women jurors looked at him as if "they were looking to get home or something," and that he was bothered by the trial judge's side bar conferences with defense counsel are clearly frivolous and certainly do

not warrant any further interrogation of the jurors. A court should not investigate the thought processes which induced a particular juror to join in a verdict. Moreover, there is nothing in Molee's testimony indicating that he voted for a guilty verdict because his will was overborne by the improper actions of other jurors. It is to be expected that in the interplay of personalities attending a jury's deliberations there will be occasions when some jurors will give vent to feelings of exasperation or frustration. The expression of these feelings should not be the basis upon which a juror may impugn the verdict, particularly a juror who, like Molee, assented to the jury's decision when polled in open court. See *People v. Van Camp, supra; Brinsfield v. Howeth,* 73 A. 289, 110 Md. 520 (Ct. of Appeals 1909).

The order of the trial court is reversed.

APPENDIX C.

MANDATE ON REVERSAL.

This cause having been duly argued before this Court by Mr. Philip R. Glucksman, counsel for the appellant and Mr. Edward G. D'Alessandro, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Essex County Court is in all things reversed, set aside and for nothing holden, with costs;

. . . . . .

and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record and proceedings be

remitted to the said Essex County Court, to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

WITNESS the Honorable JOSEPH WEINTRAUB, Chief Justice, at Trenton on the 24th day of January, 1966.

JOHN H. GILDEA,
Clerk of the Supreme Court.
A TRUE COPY,
JOHN H. GILDEA,
Clerk.